

**United States – Anti-Dumping Measures
On Certain Hot-Rolled Steel Products
From Japan (DS 184)**

**Oral Statement of the United States
Second Meeting of the Panel
September 27, 2000**

1. **Mr. Hirsh.** Thank you, Mr. Chairman and members of the Panel. The United States appreciates this opportunity to present its views regarding the issues in this dispute. Again for the record, my name is Bruce Hirsh. I am a Legal Advisor with the Office of the U.S. Trade Representative in Geneva. With me from my office in Washington is Associate General Counsel Dan Mullaney, who will begin our presentation today with a discussion of two procedural issues. James Toupin, Deputy General Counsel of the U.S. International Trade Commission, will then present the issues concerning injury. Finally, John McInerney, Acting Chief Counsel for Import Administration at the U.S. Department of Commerce, will present the issues concerning the anti-dumping calculations and critical circumstances.

2. **Mr. Mullaney.** Thank you, Mr. Chairman, and members of the Panel. With respect to the U.S. **preliminary objection** to extra-record evidence, Japan argues that DSU Article 11 and Article 17.6(i) of the Anti-Dumping Agreement, taken together, require the panel to consider facts outside of the administrative records. This position is directly contrary to Article 17.5(ii) of the Anti-Dumping Agreement, which requires the Panel's examination to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." It is also contrary to several panel decisions under the Safeguards Agreement, which, in applying Article 11 of the DSU, specifically limited the panels' review to

facts placed before the authorities.

3. Japan also claims that the Panel should take account of the statisticians' affidavit and attorneys' affidavits concerning alternate margin calculations because they are based on information on the record. This is incorrect. The calculation of a margin of dumping, for example, is a very complicated process that involves numerous decisions. Simply presenting an alternate dumping margin and asserting that it is based on a recalculation of record information is equivalent to submitting new information. The affidavit form of the information underscores this deficiency: in effect, the affiant is saying "you can't see this number in the record, but you should accept it as true, because I am swearing that it is true." The statisticians' affidavit is itself new evidence. If it is important evidence, the Japanese respondents should have submitted it for the record.

4. We will not repeat points we have already made on the special deferential **standard of review** specifically adopted by the negotiators for the Anti-Dumping Agreement. However, we note that Japan persists in suggesting that somehow Articles 31 and 32 of the Vienna Convention override the specific text of Article 17.6(ii). That article, however, reflects the negotiators' understanding that they had left enough issues ambiguous that they needed to make special provision for cases in which customary rules of treaty interpretation would not provide an unequivocal result. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. Thus, Japan's contention that the Convention requires, or even permits, a panel to choose one interpretation of ambiguous language in the Agreement as the only interpretation, would nullify the second sentence of Article 17.6(ii) of the Agreement.

5. I will now turn to my colleague, Mr. Toupin, of the U.S. International Trade Commission, to present the injury issues.

6. **Mr. Toupin.** Thank you, Mr. Chairman and members of the Panel.

The Causation Standard under Article 3.5

7. At the outset, I would like to address the arguments that Japan now makes concerning the examination under Article 3.5 of other factors injuring the industry. The United States has demonstrated how the USITC's findings satisfy the standards for such an examination articulated by the panel in the *Atlantic Salmon* decision. I will not reiterate those arguments here, and invite any further questions that the Panel may have about those factual issues. Here, I will extend our remarks concerning why *Atlantic Salmon*, and not the unadopted panel decision in *Wheat Gluten*, provides relevant guidance for this Panel.

8. The first question for construing Article 3.5 of the Anti-Dumping Agreement is, what does it mean for dumped imports to be "causing injury" under the first sentence of the Article? As the United States has indicated in its Second Written Submission, the ordinary meaning of the word "cause" includes the possibility that a factor may be regarded as causing an effect if it assists in bringing forth that outcome.¹ This definition assumes that a factor may cause an outcome through its interaction with multiple other causal factors. Thus, the ordinary meaning of the term contradicts the *Wheat Gluten* panel's conclusion that an authority must determine the quantum of injury that imports "alone" cause.

9. This interpretation is reinforced by the second sentence of Article 3.5, which provides that

¹ U.S. Second Written Submission at ¶ 80.

demonstrating “cause” consists of a “demonstration of *a causal relationship* between the dumped imports and injury.” The term “relationship” suggests that demonstrating causation consists of finding the connections between dumped imports and the industry’s overall state, not of isolating a quantum of injury ascribable to imports alone. This view is consistent with the provision of Article 3.4 that an authority must evaluate all factors having a bearing on the state of the industry. Indeed, it is difficult to see how an authority could ever define the injury caused by imports alone in view of the factors that Article 3.4 states must be considered. The impact of dumped imports on such factors as productivity, return on investment, cash flow, inventories, employment, growth, wages, and ability to raise capital, will necessarily reflect the inextricable interaction of dumped imports with other factors.

10. It is in this context that the third sentence of Article 3.5, which requires an authority not to attribute injuries caused by other factors to dumped imports, must be interpreted. The third sentence recognizes that other factors may also have what the second sentence calls a “causal relationship” to the injured state of the industry. The third sentence requires an authority to examine such other factors sufficiently to assure that the determination of a causal relationship between dumped imports and injury is not based on effects explained instead by other causes.

11. Moreover, under Article 32 of the Vienna Convention, if the terms of a provision analyzed in context remain ambiguous, a tribunal may refer to the negotiating history to resolve ambiguity. The Tokyo Round Anti-Dumping Code, which the Anti-Dumping Agreement supersedes, and the *Atlantic Salmon* decision, adopted under that Code, were plainly part of that history. The first clause of the third sentence of Article 3.5 of the Anti-Dumping Agreement is drawn almost

verbatim from the *Atlantic Salmon* decision's description of the examination it regarded Article 3:4 of the Code as implicitly requiring. The second clause is close to identical to Article 3:4 of the prior Code. The last sentence of Article 3.5, like footnote 5 in the prior Code, does not instruct an authority how to conduct the examination, but rather lists exemplary factors which may, but need not be, relevant.

12. Certainly, the documents underlying United States' implementation of the Agreement show that the United States, in agreeing to Article 3.5, reasonably understood it as adopting a requirement consistent with *Atlantic Salmon*. We attach as an exhibit the passage from the United States' Statement of Administrative Action that sets forth the United States' understanding.²

13. Finally, unlike the Safeguards Agreement, with which the *Wheat Gluten* panel was concerned, the Anti-Dumping Agreement provides that, when a provision admits of more than one interpretation, a panel is not to compel adoption of one of those interpretations. Article 17.6(ii) reflects that the negotiators of the Anti-dumping Agreement knew that they were adopting provisions that did not in every case mandate one approach. Since the negotiators adopted language so close to that used in *Atlantic Salmon*, the United States must be regarded as choosing a permissible interpretation pursuant to Article 17.6(ii) when it construes Article 3.5 in accord with *Atlantic Salmon*.

14. The *Wheat Gluten* panel acknowledges that its requirement to determine what injury is

² Statement of Administrative Action to Uruguay Round Trade Agreements Implementing Bill, H.R. 83-211, at 181-182, attached as **Exh. US/C-31**.

due to imports alone might be impracticable, and explicitly declines to explain how its test might be met. This should have indicated to the *Wheat Gluten* panel that it was adopting an interpretation of the Safeguards Agreement that the negotiators of that Agreement could not have intended. Certainly the negotiators of the Anti-Dumping Agreement did not intend to impose such an impracticable test.

Examination of Relevant Factors and Evidence

15. As for Japan's argument that the USITC should have relied on certain data from 1996 to 1998, the USITC's determination reflects that it examined the relevant factors and evidence as required by the Agreement. Japan makes much of the fact that the USITC did not make an explicit finding stating that the industry's profits rose from 1996 to 1998, when the USITC relied on the decline in profits from 1997 to 1998. Japan, however, points to no requirement of the Agreement requiring such a finding. Article 3.4 requires the authority to conduct an "examination" of profits, but requires no particular finding. The USITC plainly examined profits. Article 3.5 requires an "examination of all relevant evidence", but does not state how that examination shall be reflected. Here, the USITC plainly examined the data from 1996 to 1998, since it explained why it rejected arguments that it should rely on a broader period than 1997 to 1998. Indeed, in doing so, it explained why, in the context of the economic conditions from 1996 to 1998, it did not regard 1997 as a banner year. There is no basis in the Agreement to find that the USITC was required to do more.

16. Japan argues -- concerning both the Anti-Dumping Agreement and Article X of the GATT -- that the USITC somehow impermissibly departed from a "rule" that it would rely on data over

the entire period of its investigation. As our submissions demonstrate, there is no such rule. The USITC has in fact in numerous determinations -- reaching both affirmative and negative results -- relied on recent trends rather than on trends over the entire period. If it could not do so, the USITC would, when economic circumstances have changed over the period investigated, be forced to violate the requirement of Article 3.4 that it examine "all relevant economic factors".

17. These points are illustrated by the USITC's decision in *Elastic Rubber Thread from India*,³ on which Japan relies. In *Rubber Thread*, the USITC did indeed give weight to trends over the three-year period investigated rather than to trends in the final year. Its opinion, however, shows that it did not do so on the basis of any rule requiring reliance on three-year trends. It relied on those trends only after finding that the downward trends in the last year were an "anomaly due to unanticipated high volumes in 1997, followed by a corresponding drop in 1998."⁴ The USITC's reasoning, therefore, depended on its findings concerning the relevant economic factors. Here, the USITC found the relevant economic factors differed from those in *Rubber Thread*. Here, the USITC found the rise in demand and consumption not to be an anomaly, but rather to represent a persistent development in the relevant factors having a bearing on the state of the industry.

The captive production provision and analysis of market segments

18. Both the U.S. law concerning captive production and the USITC's determination in this case accord with the Agreement's requirement to make a determination as to injury to the

³ USITC Inv. No. 731-TA-805 (Final).

⁴ *Rubber Thread*, at 14 & n.104.

producers as a whole of the domestic like product. Japan has moved in its second written submission far from its original position in its arguments about the consistency of the U.S. captive production provision, in itself, with the Anti-Dumping Agreement. Although the United States does not agree with much of Japan's characterization of that provision, even under Japan's portrayal of it, Japan cannot establish that the U.S. statute violates the requirement that Members assure that their laws conform with their obligations under the Agreement.

19. In its first written submission, Japan stated that it was improper to consider, either primarily or secondarily, data for the merchant market sector.⁵ Japan has now abandoned this position. Japan now acknowledges that "an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the Anti-Dumping Agreement."⁶ Japan likewise agrees that the merchant market sector is the sector in which competition between the domestic industry and dumped imports is most direct.⁷

20. Similarly, Japan's First Written Submission stated that under the captive production provision "the USITC now *must* ignore the shielding effect of captive production," and the provision "makes it *impossible* for USITC to consider all relevant evidence."⁸ Japan's position has become more nuanced, and the nuance is fundamental. In its Second Written Submission, Japan acknowledges that it is permissible for an authority to focus on the merchant market sector,

⁵ Japan First Written Submission at ¶ 45.

⁶ Japan Second Written Submission at ¶ 219.

⁷ Japan Second Written Submission at ¶ 186.

⁸ Japan First Written Submission at ¶¶ 238-239 (emphases added).

but it argues that such an analysis must be explicitly related back to the industry as a whole and that the U.S. provision “*requires* no such relating back.” Likewise, rather than asserting that the USITC under the captive production provision must ignore other evidence, Japan now simply states that the provision “encourages USITC impermissibly to accentuate merchant market data in its determination.”⁹

21. The United States disagrees with this interpretation of the captive production provision. However, even if Japan were correct in its statutory construction, its allegations would not establish that the U.S. law on its face should be deemed to violate the Agreement. Japan admits that the provision does not *preclude* the USITC from relating back its findings on the merchant market sector to the whole industry. Moreover, if the statute only *encourages* the U.S. authority to accentuate certain data, the statute cannot be said to *require* the USITC to ignore any evidence. Such a showing does not meet the traditional standard for finding legislation on its face to violate an Agreement. Under that standard, only “legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation ... could be challenged.”¹⁰ Japan is wrong in claiming that this established principle is no longer applicable or only relevant when a statute has not been applied.¹¹ The Appellate Body in *U.S. –*

⁹ Japan Second Written Submission at ¶ 186.

¹⁰ *United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco*, Panel Report, adopted 4 October 1994, BISD 41S/131, at 118, *quoted in United States -- Antidumping Act of 1916*, AB-2000-5, AB-20006, at ¶ 88.

¹¹ Japan Second Written Submission at ¶¶ 175, 177.

1916 Act specifically denied that the panel there made such a finding.¹² Similarly, the panel in the *Section 301* dispute stressed that it was not overturning the jurisprudence on the mandatory/discretionary distinction.¹³

22. In fact, as the United States has indicated, its anti-dumping statute does require that the authority make its determination with respect to the industry as a whole, and the captive production provision does not alter this requirement. Many aspects of the statute support this conclusion. The statute requires the USITC to make its determination as to the industry, which it defines as producers as a whole of the domestic like product. The requirement to “focus primarily” on the merchant market for certain factors assumes that, even for those factors, the USITC’s analysis will proceed further. Moreover, the Statement of Administrative Action makes clear that, when the USITC considers those factors to which the captive production provision applies, it may “focus” on other evidence in addition to the merchant market sector. Likewise, the statute requires the USITC to consider other factors to which the provision does not apply. Further, the statute requires the USITC to consider “all relevant economic factors” and no one factor can “necessarily give decisive guidance.” Thus the statute as a whole provides the USITC with discretion to consider all evidence and factors, and requires it to make a determination as to the industry as a whole.

23. Even if the U.S. statute did not clearly mandate a determination as to the industry as a whole, when a statute that an authority administers is ambiguous, U.S. courts defer to an

¹² *United States -- Antidumping Act of 1916*, AB-2000-5, AB-2000-6, at ¶ 93.

¹³ *United States -- Sections 301-310 of the Trade Act of 1974*, adopted 27 Jan. 2000, WT/DS152/R at ¶ 6.9.

authority's considered interpretation if that interpretation is reasonable. The Statement of Administrative Action expresses Congress' intent that the captive production provision would be consistent with the Anti-Dumping Agreement. Consequently, the authority applying that provision properly under U.S. law resolves any ambiguities in the captive production provision and its relation to the statute in a manner consistent with the United States' obligation under the Agreement.

24. Indeed, it is Japan, not the United States, that forgets that the necessary inquiry pertains to the industry as a whole. Japan claims that the USITC should have made findings about a fall in the demand by pipe and tube manufacturers for hot rolled steel because two steel producers particularly depended on that demand.¹⁴ The USITC, however, found that overall demand increased substantially and that the industry as a whole should have been able to take advantage of that growth in demand. The USITC concluded that imports prevented the industry as a whole from doing so. Japan has not shown how, in view of the overall growth in demand, the fact, if true, that two firms faced a fall in demand in a particular submarket is relevant to the assessment of injury to the industry as a whole.

25. Japan is reduced to arguing that this Panel should hold that the U.S. Congress repealed the other provisions of the U.S. statute that call on the USITC to make a determination as to the industry as a whole when it enacted the captive production provision -- even though Congress didn't say so.¹⁵ Frankly, this argument demonstrates the implausibility of Japan's position. Japan

¹⁴ Japan Second Written Submission at ¶ 267.

¹⁵ Japan Second Written Submission at ¶ 193.

is effectively asking this Panel to rewrite the U.S. statute in order to make it violate the Anti-Dumping Agreement.

26. The sources concerning United States law that Japan cites, support, rather than conflict with, the United States' position here. As the U.S. Supreme Court stated in the *Watt* case that Japan cites, "repeals by implication are not favored ... The intention of the legislature to repeal must be 'clear and manifest.'"¹⁶ Japan presents sections of a treatise on statutory construction as an exhibit¹⁷ but pointedly omits the preceding section of the treatise that makes clear that U.S. courts seek to read statutes as a whole to avoid finding different statutory provisions to be in conflict.¹⁸ We attach that prior section as an exhibit. It is clear that a court would uphold the USITC in resolving any ambiguities to construe the captive production provision to accord with the statutory requirement to make a determination as to the industry as a whole.

27. The USITC's consideration in this case of the merchant market was consistent with the Agreement. As both Japan and the United States have advised the Panel, under U.S. law only three Commissioners needed to vote in the affirmative in order to render an affirmative determination, and three Commissioners who voted in the affirmative found that the captive production provision did not apply. The obvious consequence of this fact is that, even if this Panel were to hold that the provision on its face violated the Agreement, such a ruling would not

¹⁶ *Watt v. Alaska*, 451 U.S. 259, 267, quoting *Morton v. Mancari*, 417 U.S. 535, 549, *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936), *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). See **Exh. JP-101**.

¹⁷ **Exh. JP-101**, including excerpt from 2A *Sutherland Stat Const* § 46.06 (6th Ed. 2000).

¹⁸ 2A *Statutes and Statutory Construction* § 46.05 (6th Ed. 2000), excerpts attached as **Exh. US/C-30**.

affect the validity of the USITC's determination. In its First Written Submission, Japan sought to avoid that consequence by arguing that, although Commissioner Bragg did not apply the captive production provision, her determination also erred because she made findings about the merchant market sector "in parallel" with findings about the industry as a whole.¹⁹ Since Japan now agrees that making findings about a sector do not *per se* violate the Agreement, its Second Written Submission abandons this approach.

28. Instead, Japan now contends that Commissioner Bragg's determination is somehow "tainted" because, although she did not apply the provision, she allegedly "passively" joined the decision of three commissioners who did.²⁰ This argument does not rise to the level of a *prima facie* case. The face of the determination shows that the four Commissioners were co-authors of their joint views. Wherever Commissioner Bragg believed that her views differed from those of her colleagues, she specifically so noted. There is simply no evidence that she was in any way "passive."

29. In the determination at issue here, the Commission considered data on certain factors concerning "the particular sector in which the competition between the domestic industry and dumped imports is most direct,"²¹ namely, the merchant market sector. It also made specific findings concerning the entire industry's data for those and other factors. Both sets of data supported an affirmative determination. The decisions that Japan cites for the proposition that an authority must relate its findings concerning a sector to the industry as a whole, concern

¹⁹ Japan First Written Submission at ¶ 250.

²⁰ Japan Second Written Submission at ¶¶ 225-226.

²¹ *Mexico -- High Fructose Corn Syrup*, adopted 24 Feb. 2000, WT/DS132/R at ¶ 7.160.

determinations in which the authority did not in fact make findings about the industry as a whole, either in the entire determination or with respect to numerous required factors. Here, the USITC made findings on all relevant factors concerning the industry as a whole. The fact that it also made findings about the merchant market sector does not detract from the fact that its injury determination was based on data as to the industry as a whole.

30. Moreover, those findings necessarily account for trends in the non-merchant market sector. Here there were only two sectors accounting for all production, and the USITC analyzed, for each factor, data for one sector and for the industry as a whole. The difference in results for each factor necessarily reflected the impact on the industry as a whole of trends in the sector as to which the authority did not make separate findings.

31. The USITC here further made specific findings demonstrating the consequences for the industry as a whole of developments in the merchant market sector. For example, the USITC found that most performance indicators for the U.S. industry as a whole declined because the U.S. industry was prevented from participating in the growth of demand and consumption. The USITC found that the growth of the dumped imports' share of the merchant market sector at the expense of the domestic industry's share caused the U.S. industry not to participate in the growth in demand. It also found that, as a result, capacity that the U.S. industry brought on line to meet the growth in demand immediately became excess capacity.²² Moreover, the USITC found that the decline in the industry's operating income at the end of the investigation coincided with the

²² USITC Report at I-17.

decline in its capacity utilization rates.²³ Through these and other findings, the USITC demonstrated the causal relationship between the effects of dumped imports on the industry's merchant market performance and injury to the industry as a whole.

32. In sum, the USITC's findings amply satisfy the standard that Japan has espoused. Japan itself quotes and approves prior panel authority stating that an analysis of the sector most exposed to import competition can sustain an injury determination if an authority *either* analyses all other sectors *or* demonstrates the relationship between events in the one segment and the industry as a whole.²⁴ Japan's contention that the USITC's determination was flawed unless it made specific findings concerning developments in the captive production sector has no basis in prior decisions or in the Agreement.

33. Finally, Japan complains at length that the USITC did not make findings in this case about the captive production sector in the same way as it did in its *1993 Flat Rolled Steel* determination. Suffice it to say here that the USITC in 1999 specifically recognized the effects of captive production.²⁵ The sole differences between the 1993 and 1999 determinations on this point seem to be that in 1999, the USITC spoke about relative "sensitivity" to imports rather than using the word "shielded"; in 1999, the USITC made its findings about the amount of captive production and the applicability of the provision in the section labeled captive production and made its finding on "sensitivity" in the next section of its opinion; and, as the facts had changed between 1993 and

²³ USITC Report at I-20.

²⁴ Japan Second Written Submission at ¶ 210 and n. 250, ¶ 221, *citing and quoting Mexico -- High Fructose Corn Syrup*, adopted 24 Feb. 2000, WT/DS132/R, at ¶¶ 7.155, 7.160.

²⁵ USITC Report at 11, 19.

1999, the USITC reached a different conclusion. With due respect to our Japanese colleagues, such differences cannot even plausibly suggest a violation.

34. Mr. McInerney will now address Japan's contentions about the United States' dumping calculations and critical circumstances.

35. **Mr. McInerney.** Thank you Mr. Chairman. With respect to the Department's **use of facts available**, Japan's second written submission emphasizes two points that are both wrong. First, Japan claims that adverse inferences are "punitive," and, therefore, improper. (Japan's 2d Sub., ¶¶ 28 & 30.) This ignores the fact that, where a party has not submitted necessary information, adverse inferences are, in fact, the most reasonable and logical conclusion to be drawn about that missing information. This is precisely the point recognized by the Appellate Body in the *Canada - Civilian Aircraft* case. Japan's attempt to distinguish that case as using an adverse inference during the course of a WTO dispute settlement proceeding, rather than an anti-dumping investigation, disregards the fact that the rationale for both decisions was identical - that the adverse inference was made both necessary and reasonable by the non-cooperation of the responding parties. In addition, Japan has yet to explain why its own authorities applied exactly this rationale in Japan's anti-dumping investigation of cotton yarn from Pakistan.

36. Second, Japan claims that, because the Japanese respondents were generally cooperative, this licensed them to refuse to cooperate with regard to certain selected categories of information. (Japan's 2d Sub., ¶ 24.) This position finds no support in the Agreement. It would amount to a 70% or 80% cooperation rule, under which respondents would have to cooperate only up to the threshold of "general cooperation," after which they would be free to withhold information. This

would license respondents to manipulate the results of anti-dumping investigations by withholding selected categories of adverse information.

37. With regard to the **application of facts available to KSC**, Japan now tries to rationalize KSC's refusal to exercise its powers, as a fifty percent owner of CSI, to obtain the necessary information by itemizing the ways in which KSC, CVRD, and CSI regularly ignored the CSI shareholders' agreement (Japan's second submission at ¶ 47). But the fact that KSC regularly ignored the shareholders' agreement does not prove that it had no power under that agreement - - only that KSC did not always choose to exercise that power. As the minutes of the CSI board meetings make clear (Exh. US/B-23/bis), the parties to the joint venture repeatedly raised, discussed, and made decisions on business matters, as provided for in the agreement. In this light, the fact that KSC never even *discussed* with CVRD the need to provide the requested CSI data, and never *challenged* the actions of CSI's president and CEO (who served at the pleasure of the board members representing KSC and CVRD) is glaring. (See U.S. 1st submission, ¶ 90).

38. Finally, Japan's belated claim that CSI was *unable* to supply the requested information is based on one sentence in one letter from CSI. This new claim is not supported by the weight of the record evidence. Indeed, KSC itself characterized this statement by CSI as a refusal, not an inability, to provide the requested information. (U.S. 2nd submission, ¶ 18; Exh. JP-93(a) and (c)). Accordingly, Commerce properly found that KSC failed to cooperate in providing the requested CSI data.

39. As facts available for the sales through CSI, Commerce reasonably chose a dumping margin calculated by comparing KSC's own sales to unaffiliated U.S. customers to its sales of

that same product in Japan. This selection of a dumping margin based upon KSC's product-specific, verified data represents a reasonable choice of adverse facts available. Yielding to KSC's attempt to force Commerce into using its transfer prices to CSI as a "plug" for facts available would give every respondent *carte blanche* to shelter dumped sales through its overseas affiliates.

40. With regard to **Commerce's application of facts available to NSC and NKK**, the Department was simply exercising its clear right under the Agreement to enforce reasonable deadlines. Japan's curious theory that any firm limits on the time in which information must be submitted, even after repeated extensions, are inimical to a "reasonable" understanding of "timeliness" has no support in the Agreement. Similarly baseless is Japan's theory that untimely information must be accepted if it is otherwise in compliance with the requirements of the Agreement. Paragraph 3 of Annex II requires that parties meet *all four* of the basic criteria listed in that paragraph in order for their information to be considered. One of these four conditions is that the information be "supplied in a timely fashion."

41. The weight conversion factors untimely submitted by NSC and NKK were not, as Japan claims, "corrections" (Japan's 2d Sub., ¶ 93). They were categories of information that NSC and NKK had repeatedly claimed were not necessary and were impossible to submit, *at all*. Therefore, Commerce's rejection of this new information was perfectly consistent with its acceptance of various corrections of previously-submitted data very late in the investigation (Japan's 2d Sub., ¶ 94, fn.91). Nor did NSC and NKK's protestations of "good faith" compel the acceptance of their conversion factors. It is impossible for investigating authorities to know a

party's motivation for not submitting data when it is due, and the Agreement does not require the authorities to attempt to discern its motivation.

42. Finally, we must take issue with the claim that the facts available Commerce chose were not rationally related to the sales affected by the absence of the conversion factors. The Department used an adverse normal value for NKK's theoretical weight sales in Japan because the only element affected by the absence of the conversion factor was the normal value. As we have noted, this highly circumspect application of facts available had a minuscule effect upon NKK's margin. As for NSC, the Department's selection of margins from its actual-weight sales in the U.S. market as facts available for the theoretical-weight sales of the same products in the U.S. market was also reasonable.

43. With regard to **the "all-others" rate**, Japan is asking the Panel to re-write Article 9.4. Article 9.4 does not state that the all-others rate must exclude margins calculated in part by "*using*" facts available (Japan's 2d submission, at ¶ 117). Instead, Article 9.4 tells authorities to disregard margins which were "*established*" on the basis of the facts available. The most obvious interpretation is that such margins are "*established*" entirely on the basis of the facts available, for respondents that have generally failed to cooperate. Similarly, Article 9.4 does not require the exclusion of "portions" of margins based on facts available. It tells authorities to "*disregard*" *margins* established on the basis of the facts available, not to "*recalculate*" them without facts available.

44. The U.S. reading of Article 9.4 – that a margin is only "*established* based on the facts available" when it is not a calculated margin, but is based entirely on the facts available – is a

reasonable and permissible one. Indeed, Japan claims only that nothing in Article 9.4 "prevents" the Department from removing "portions" of margins using facts available and that its preferred approach "better reflects" Article 9.4 than the U.S. interpretation. However, nothing in Article 9.4 requires the Department to follow Japan's preferred approach. If investigating authorities must disregard margins based only in part on the facts available, no margins would remain to calculate the all others rate in a great many cases, including this one.

45. Japan further argues that the Agreement makes clear that companies not individually investigated should not be affected by the behavior of investigated companies. (Japan's 2d Sub., ¶ 117) Exactly the opposite is true. Article 9.4 expressly provides for the behavior of the investigated companies to serve as a proxy for the companies not individually examined. In so providing, Article 9.4 avoids either unduly rewarding or penalizing the companies not investigated by eliminating the margins at both extremes - - the zero and *de minimis* margins and the presumably highest margins based entirely upon facts available. Reading Article 9.4 to require the exclusion of margins based even in part on the facts available would defeat its purpose of producing a reasonable average by eliminating the margins at each extreme of the range.

46. With regard to the **treatment of home market sales through affiliated parties**, Japan's "symmetry" argument concerning the Department's 99.5% test ignores the fact that, although in the ordinary course of trade a company will sell at prices as high as the market will bear, a company normally will not sell *below* market prices. The reasonableness of the Department's "asymmetrical" approach to sales to affiliated parties in the home market is demonstrated by the fact that it is essentially the same as the margin calculation itself. The reason for this similarity is

that the margin calculation and the arm's-length test have parallel objectives: the margin calculation discerns whether the sales in question (which are the export sales) have been sold below normal value in the home market; the arm's-length test determines whether the sales in question (which are the sales to the affiliate in the home market) are sold below average prices to unaffiliated parties. In each case, the group of sales is tested to determine whether it is priced *below*, not above, the applicable benchmark.

47. Japan's arguments against the **use of downstream sales in the home market** are also invalid. Article 2.1 defines dumping as selling at less than "the *comparable price, in the ordinary course of trade*, for the like product when destined *for consumption in the exporting country*" (emphasis supplied). A sale through a related party to an independent purchaser in the home market is just such a sale - - a sale of the like product, in the ordinary course of trade, destined for consumption in the exporting country. Accordingly, such sales are an appropriate basis for normal value. Article 2.2 calls for authorities to base normal value on constructed value or third country prices only "[w]hen there are **no** sales of the like product in the ordinary course of trade in the domestic market of the exporting country." (emphasis supplied).

48. By challenging the Department's practice of using perfectly valid home market downstream sales to unaffiliated parties, Japan is seeking to require investigating authorities to use either the prices of sales to related parties in the home market, which could easily be manipulated, or sources other than prices in Japan. This is not speculative - - NKK, for example, sold 93 percent of its merchandise through affiliated trading companies at the time of the investigation (64 Fed. Reg. at 24339). If the Department were precluded from using such sales, it

would be forced to base normal value either on constructed value or Japan's sales to third countries.

49. Finally, the United States disagrees with Japan's claim that the use of downstream sales violates the fair comparison requirement because the Department's level of trade adjustment does not address differences in price comparability due to resellers' costs and profits. First, the United States notes that this Panel's terms of reference do not include any challenge to Commerce's practice with regard to level of trade adjustments, either generally or in this investigation. Thus, Japan cannot now raise this issue. In any event, when the Department compares export sales to downstream home market sales at a different level of trade, the U.S. statute (19 U.S.C. § 1677b(a)(7)) provides that "the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined." Such "price differences" would include the effects of both cost and profit.

50. With regard to Commerce's **Preliminary Determination of Critical Circumstances**, acceptance of Japan's claims would render Article 10.7 meaningless. Japan completely ignores the fact that the "sufficient evidence" required by Article 10.7 may be found at any time "after initiation." Japan provides no explanation for the lack of any other temporal restriction, but instead simply insists that the decision cannot, "as a practical matter," be made prior to a preliminary determination of dumping. Japan also continues to insist that petition exhibits are nothing more than "allegations," despite the obvious fact that the petition in this investigation contained very substantial evidence.

51. With respect to the injury requirement, Japan continues to ignore the express language of

the Agreement, which provides that the term “injury” in Article 10.6 *includes* “threat of injury” because it does not specify otherwise. Moreover, Article 10.4 does not prevent a preliminary critical circumstances finding based upon “threat of injury.” Article 10.4 merely states that, in accordance with Article 10.2, if there is a final determination of “threat of injury,” an additional finding must be made in order to impose retroactive duties. This additional finding was not necessary in this investigation because the final determination was of *current injury*. The question presented under Article 10.4 is simply not present here.

52. Japan also argues that the Department’s selection of the comparison periods for volume of imports and its determinations regarding knowledge of dumping and likely injury were arbitrary. However, the sequence of events fully supports the Department’s determinations. *First*, importers became aware of potential investigations when the U.S. industry declared in published interviews that it planned to bring anti-dumping actions; *second*, a surge in dumped imports followed the date of those interviews; and *third*, importers during and after the surge became aware of the massive dumping and consequent threat. The critical circumstances provisions were intended to address precisely such surges in dumped imports.

53. Finally, Japan suggests that the United States is asking the Panel to look only at decisions made at the *end* of the investigation. This is not true. We ask that the Panel look at *this preliminary* decision. You will find ample supporting evidence to satisfy the requirements of Articles 10.6 and 10.7. Indeed, it is curious that, to support its arguments, Japan continuously refers the Panel to the *final* dumping margins - not the preliminary margins. It is *Japan* that would like the Panel to focus upon the decisions made at the *end* of the investigation.

54. With respect to **Article X**, Japan's claims are curious. Although couching its argument in terms of "due process" and "fairness," Japan is really trying to have Article X override provisions of the Anti-Dumping Agreement. Japan's claim is not about due process, in the sense of the *Shrimp-Turtle* decision it cites. There is no denying that the U.S. investigation was open and transparent and allowed full opportunities for the submission of facts, views, and rebuttals. Rather, this dispute is about specific decisions fully consistent with and authorized by the Anti-Dumping Agreement that Japan does not like, and hopes to attack collaterally through Article X:3. The Panel should not permit such a collateral attack.

55. The differences between the Commerce Department and the U.S. International Trade Commission with respect to information gathering and facts available are attributable to the different functions of these two agencies, not to any partiality, lack of uniformity, or unreasonableness. Indeed, the Commission's approach applies equally to information from all parties before it, whether they be U.S. or non-U.S. parties.

56. In deciding to accelerate the investigation, Commerce was reacting to an unprecedented surge in imports which more than justified its modest acceleration of the investigation. Japan has failed utterly to show that the acceleration prejudiced any of the Japanese respondents. Agencies must have the flexibility to respond to such special circumstances. The same may be said of Commerce's recent policy on critical circumstances. "Fundamental fairness" does not require that Commerce adhere rigidly to past approaches in the face of an unprecedented import surge.

57. Thank you, Mr. Chairman and members of the Panel.